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Alan Ritchey, Inc. and David LaValley and Alan Ritchey Drivers Employed under USPS Contract HCR 75120, 38121 (Relaying from Flagstaff, Arizona). Cases 28–CA–18282, 28–CA–18351, and 28–CA–18381

January 13, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On July 3, 2003, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a response.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

In adopting the judge’s finding that the Respondent did not violate Section 8(a)(3) of the Act by discharging employee Dave LaValley, we note that the judge failed to articulate his analysis in terms of *Wright Line*.¹ Accordingly, we set forth our analysis below.

The judge also failed to give adequate reasons for his finding that the Respondent did not violate Section 8(a)(5), (2), and (1) of the Act by conducting its December 13, 2002² poll of employees as to whether they wanted LaValley to represent them. Our reasoning on this matter is set forth below.

Facts Concerning the Discharge

The Respondent and the Union, Alan Ritchey Mail Transportation Drivers Mutual Cooperation Association, were signatories to a first contract running from January 30, 2001, until May 30, 2003, and covering a unit of drivers. The Union is a loose-knit, informal group with no officers, no constitution or bylaws, no dues structure, and no regular meetings. David LaValley negotiated the first contract for the Union.

LaValley’s driving record was without blemish. However, LaValley had a history of abusive language and excessive use of profanity, and he sometimes demonstrated a volatile temper. His immediate supervisor and

friend, Don Ash, testified that he had given LaValley many informal, friendly warnings about his behavior, and told him that some day his mouth would get him into trouble. According to Ash, Respondent’s Operations Manager Billy Williams “called me and asked me to verbally have a talk with [LaValley] and try to settle [LaValley] down,” and that Ash had done so “more than once.”

In September, LaValley was involved in two incidents of misconduct. In the first incident, LaValley left a beligerent voice-mail for Supervisor Eddy Goins after Goins reprimanded him for leaving personal belongings in a company truck. LaValley used language such as “goddamn truck . . . [t]his isn’t your damn business. . . . Keep out of my business.” In the second one, on September 13, LaValley visited the Concentra Medical Clinic for the physical exam required for his employment.³ LaValley became exasperated when he allegedly received an unfriendly reception upon asking for a doctor by her first name, when he waited for some time, and when a clinic employee demanded that he pay \$15 for one of the required forms. LaValley became loud and abusive, and engaged in name calling, swearing, and shaking his finger. Two nurses were intimidated by LaValley’s conduct and asked him to leave. When LaValley failed to do so, the nurses threatened to call the police. LaValley then left the clinic. The nurses reported that LaValley called them “broads” and yelled, “piss on all the doctors just piss on them all.”

The clinic notified the Respondent of the incident and informed the Respondent that LaValley was not permitted to return to the clinic. The Respondent’s safety committee, consisting of Operations Manager Williams, Safety Director Tom Riddle, and Human Resources Director Debra Norwood, investigated the incident over the next few days. The committee prepared memoranda of their conversations with witnesses from the clinic and ultimately decided to terminate LaValley. LaValley did not deny creating the disturbance and using profanity. In fact, LaValley faxed an apology for his behavior to the clinic 2 days after the incident. The Respondent discharged LaValley on September 20, citing the Concentra clinic incident. At the hearing, the Respondent asserted that the angry voice mail was also a factor in LaValley’s termination.

Facts Concerning the Polling

The contract between the Respondent and the Union was scheduled to expire in May 2003. However, Respondent’s Operations Manager Williams learned in October 2002, that a new contract had to be in place by

¹ 251 NLRB 1083 (1980), enf’d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), adopted in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

² All dates are in 2002 unless otherwise indicated.

³ The Respondent had arranged for employees to use the clinic.

January 30, 2003. This was because the Postal Service (the Respondent's customer) had set that date as a deadline for a new collective-bargaining agreement. If there were no agreement in effect by that date, the Postal Service's payments to the Respondent would reflect the wages of the prior contract, and those wages would remain in effect for a year or two.⁴

Williams mistakenly believed that LaValley could not represent the employees because he was no longer employed by the Respondent. There was also confusion among the employees, some expressing concern about having LaValley represent them, and LaValley himself assuming that he would be the negotiator for the new contract. Another employee, Martin Aldrich, volunteered to become the spokesperson for the drivers. On December 9, employee Ed Bender sent a memorandum to all the drivers and to Williams expressing his confusion and the need for more formal organization in the Union. Bender indicated that he was opposed to having LaValley represent the drivers and noted that LaValley had the support of only 8 out of 20 drivers. Bender expressed his hope that the situation could be resolved speedily because time was of the essence with respect to the forthcoming negotiations for the second contract.

On December 13, Williams decided to address the employees' concerns by polling the drivers. Each driver was given a memorandum asking him to state whether he wanted LaValley to remain as his "bargaining representative." The memorandum stated that "[i]t is important that we know who your bargaining representative is so that we may communicate with and negotiate with that person pursuant to the mutual cooperative agreement." The drivers were asked to complete the memo, sign it, and return it. Fifteen drivers indicated that they did not want LaValley; 8 drivers indicated that they did. On January 3, 2003, Williams notified LaValley of the vote and stated that he would be negotiating with the drivers' newly selected representative, unless otherwise notified by the drivers. Subsequently, employee Aldrich notified Williams that he was the drivers' representative. Aldrich, with LaValley's assistance, negotiated a new 2-year agreement with the Respondent.

Judge's Decision and Analysis

1. LaValley discharge

The judge dismissed the allegation that the Respondent discharged LaValley in violation of Section 8(a)(3) of the Act. We agree. The burden and allocation of proof is set forth in *Wright Line*, supra: The General Counsel must

first prove, by a preponderance of the evidence, that the employee's protected activity was a motivating factor in the employer's adverse action.⁵ Once the General Counsel makes this showing, the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct."⁶ *Wright Line*, supra at 1089.

Here, the judge in essence found that the General Counsel failed to meet his initial burden. The judge noted that there was no showing that Operating Manager Williams harbored antiunion animus. The judge specifically credited Williams' and Safety Director Riddle's testimony that LaValley's status as negotiator had nothing to do with the decision of the safety committee to discharge him. The judge also credited Supervisor Ash's denial that Ash told LaValley that Williams had not hired a union advocate applicant. Further, the judge found that the Respondent was not concerned that LaValley's position as a negotiator would somehow be detrimental to the Respondent's interests during future negotiations. Finally, the judge essentially found that, even assuming the General Counsel met his initial *Wright Line* burden, the Respondent carried its rebuttal burden. Thus the judge found that LaValley had engaged in misconduct, and that he had been previously warned many times about his inability to control his language and his temper.

Assuming arguendo that the General Counsel made his initial showing, we agree that the Respondent has met its burden under *Wright Line*. Ash made it clear that Williams had asked Ash to reprimand LaValley on more than one occasion concerning LaValley's volatile temperament and use of abusive language, and that Ash had done so. LaValley's behavior at the Concentra Medical Clinic amounted to a public demonstration that he could control neither his temper nor his language. LaValley himself acknowledged his inappropriate behavior. He did not deny that he had created a disturbance and used profanity. He in fact forwarded an apology to the clinic within 2 days of the incident. Under these facts, we are satisfied that the Respondent has shown that it would

⁵ See *Manno Electric, Inc.*, 321 NLRB 278 (1996).

⁶ Regarding the *Wright Line* analysis, Member Schaumber notes that the General Counsel's initial burden of showing discriminatory motivation involves proving the employee's union activity, employer knowledge of the union activity, and animus against the employee's protected conduct. The Board and circuit courts of appeals have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as a fourth element, what is otherwise inferred under the *Wright Line* analysis, the necessity for there to be a causal nexus between the union animus (i.e., Sec. 7 animus) and the adverse employment action. See, e.g., *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), Member Schaumber agrees with this addition to the formulation.

⁴ This was pursuant to a contract between the Respondent and the United States Postal Service (USPS).

have discharged LaValley even in the absence of any union activity. See *Mediplex of Stanford*, 334 NLRB 903 (2001).

2. Polling of employees

The General Counsel also alleged that the Respondent's poll of the drivers concerning whether they wanted employee LaValley to represent them violated Section 8(a)(1), (2), and (5) of the Act. The judge dismissed all three aspects of the allegation, but discussed only the 8(a)(1) allegation. The judge observed that the Respondent was not trying to withdraw recognition from the Union and found that the Respondent's poll was non-coercive. The judge also noted several other factors: "time was of the essence; the drivers were clearly involved in an intra-union dispute; the poll was conducted for a legitimate reason; it was factual and the Respondent did not indicate a preference for one negotiator over another; all the drivers were aware of the surrounding circumstances; there was no anti-union animus by the Respondent; and there were no contemporaneous unfair labor practices that would cause the Respondent's motives to be suspect." In sum, the judge found that the Respondent was anxious to begin negotiations on the second contract for the benefit of the drivers and the Respondent "simply and legitimately wanted to know with whom to negotiate." We agree with the judge, for the reasons he states, that the Respondent's poll did not violate Section 8(a)(1) of the Act. The Respondent's conduct did not tend to interfere with the free exercise of employee rights under the Act. See *Williamhouse of California, Inc.*, 317 NLRB 699, 713 (1995).

We also agree with the judge that the Respondent's poll did not amount to direct dealing, and therefore did not violate Section 8(a)(5) of the Act. The criteria to be applied in determining whether an employer has engaged in direct dealing are: (1) was the employer communicating directly with union-represented employees; (2) was the discussion for the purpose of establishing or changing wages, hours, and terms and conditions of employment, or undercutting the union's role in bargaining; and (3) was such communication made to the exclusion of the union. See *Southern California Gas Co.*, 316 NLRB 979, 982 (1995). Certainly, when the Respondent polled the drivers as to whether they wanted LaValley to represent them, it was communicating directly with union-represented employees. However, neither of the other two criteria are present here. The Respondent polled the drivers only to resolve the dilemma of the identity of the drivers' representative for the forthcoming negotiations. Terms and conditions of employment were not discussed, and the Respondent in no way denigrated the Union. As to the third factor, the communication was not for the

purpose of *excluding* the union. To the contrary, the purpose was to assure that the union, through a representative, would be involved in the bargaining. Indeed, the Respondent's memorandum to the drivers indicated that the Respondent desired to begin negotiating for a successor collective-bargaining agreement. The Respondent did, in fact, bargain with the Union, and the parties successfully negotiated a second agreement. We therefore find that there was no unlawful direct dealing. See *Permanente Medical Group, Inc.*, 332 NLRB 1143, 1145 (2000) (no direct dealing where "Respondent always made clear that its bargaining obligation ran to the Unions, and it honored that obligation").

With further respect to the "direct dealing" contention, our colleague suggests that the Respondent should have contacted LaValley as to whether he should be regarded as the chosen representative. However, LaValley was obviously not a disinterested observer. Thus, we think that the Respondent acted properly by going to the employees.

We recognize that, under Section 8(a)(2), an employer may not "interfere with the . . . administration" of a union. We also recognize that selection of a representative is normally an internal matter for a union. However, in the special circumstances of this case, we find no 8(a)(2) violation. The Respondent was under time pressure to negotiate with *someone* from the Union. It was unclear who that someone would be. The Union was so loosely organized that it was virtually impossible to find out from an authorized person who the representative would be. Accordingly, on a one-time basis, the Respondent took the prudent step of letting the employees choose a representative. In these circumstances, we perceive no unlawful effort to interfere with the administration of the Union.

Our dissenting colleague would find that the Respondent's poll of its employees violated Section 8(a)(1) and (2) of the Act. In so reasoning, our colleague misapplies precedent. First, she likens the Respondent's poll to those that violate the Act because the employer is seeking to justify either withdrawing recognition from a union⁷ or recognizing a favored union over another.⁸ As the judge correctly observed, however, and as we emphasize, those cases are inapposite here. The Respondent was not attempting to determine whether the employees wanted a union, nor was it trying to rid itself of the drivers' union, nor even of the obligation to deal with any particular negotiator. Rather, the Respondent was simply attempting to determine who would represent the drivers'

⁷ See, e.g., *Struksnes Construction Co.*, 165 NLRB 1062 (1967).

⁸ See, e.g., *Modern Drop Forge Co.*, 326 NLRB 1335 (1998).

union in bargaining, and to resolve that question as quickly as possible given the circumstances.⁹

Our dissenting colleague states that the Respondent seized on the employees' concern that LaValley was not a suitable bargaining representative and "ran with it." She further states that the Respondent's poll placed employees "on the spot," by eliciting their views about a representative (LaValley) who "they would reasonably believe was disfavored by their employer." We disagree. The memorandum does not indicate the Respondent's views concerning LaValley as a negotiator. The memorandum simply recites the fact that many of the *employees* had said that they did not want LaValley as their negotiator. The Respondent then merely asked *employees* to indicate their views. The memorandum said: "It is important that we know who your bargaining representative is so that we may communicate with and negotiate with that person pursuant to the mutual cooperation agreement." The memorandum did not disparage LaValley; rather, it accurately stated that there was a question concerning whether employees wanted him as their negotiator, and the Respondent desired to open negotiations with the Union as soon as possible. The employees all knew that a possible pay raise was dependent on negotiations being completed by January 30, 2003. We conclude that those employees would reasonably understand the Respondent's action as an effort to meet that deadline, and one that had nothing to do with the Respondent's view (if it had one) of LaValley.

Our dissenting colleague also criticizes the judge's and our reliance on a number of factors, notably the absence of animus, in finding an absence of interference or coercion. She states that "[n]either the judge nor the majority explains the basis in law for treating these criteria as probative" and that a finding of coercion is "independent of motivation." Our reliance on those criteria, however, merely reflects the well-established test of the totality of the circumstances for finding interference or coercion. See, e.g., *Grinnell Fire Protection Systems Co.*, 328 NLRB 585, 587 (1999), *enfd.* 236 F.3d 187 (4th Cir. 2000), *cert. denied* 534 U.S. 818 (2001) (threats and inducements); *Demco New York Corp.*, 337 NLRB 850, 850-851 (2002) (interrogations). The absence of animus is a legitimate consideration in this case, and merely one

among many supporting our finding that the Respondent's poll of its employees did not interfere with employee rights.

Finally, our dissenting colleague suggests that the Respondent's action interfered with the drivers' own "active[]" efforts to "choose a representative for the upcoming negotiations." In our view, our colleague overstates the pace and progress of those efforts. Although employee Bender had communicated with his fellow employees, in an attempt to get them to address the issue, the employees had done nothing in response when the Respondent sent its December 13 memorandum to employees. While it is true, as our colleague points out, that LaValley circulated a petition among the employees from December 7 through 14, seeking to ascertain whether they still regarded him as their representative, LaValley did not present this petition to the Respondent or the employees, nor even inform the Respondent of the petition's existence. Accordingly, LaValley's action did not relieve the Respondent of the dilemma it faced as of December 13, and the mere fact that LaValley circulated the petition does not indicate that the Union would have resolved the matter on its own in a timely fashion. In view of the upcoming holiday season and the January 30 deadline, we conclude that the Respondent did not interfere when it simply asked employees to indicate whether they wanted LaValley as their negotiator.¹⁰

In sum, we conclude that the Respondent's poll violated neither Section 8(a)(1) nor (2) of the Act.

We emphasize the unique facts of this case. The Respondent was "under the gun." It had to negotiate a contract by January 30, 2003. If it did not, the employees would be a prime loser. At the same time, it had bona fide doubts about the basic issue concerning with whom to negotiate. It turned to the employees for an answer to that question. We recognize that, in general, an employer may not go to the employees with respect to this matter. But, unique circumstances call for a reasonable legal result. We reach that result with no intention of upsetting general legal principles.

We also conclude, unlike our dissenting colleague, that the Respondent did not violate Section 8(a)(5) and (1) by refusing to proceed to step two of the parties' grievance procedure following LaValley's discharge. We agree with the judge, for the reasons he states, that the Respondent had legitimate reasons for concluding that LaValley did not invoke step two review. Rather, at the end of a

⁹ Indeed, each of the cases cited by our dissenting colleague was marked by an employer's interference with its employees' right to be represented in their chosen manner. In *Modern Drop Forge*, for example, the Board found that the employer's rush to negotiate with one group of employees rather than the lawfully designated agents of the union was an "extreme case of employer interference. . . ." *Id.* at 1336. By contrast, the Respondent here was not seeking to negotiate with one group over another. It was simply trying to determine the appropriate person with whom to negotiate.

¹⁰ Our dissenting colleague contends that it was the Respondent's obligation to address any concerns it had to LaValley. Again, given the need to resolve its dilemma quickly and accurately, we do not fault the Respondent for polling the employees rather than seeking a self-serving assessment from LaValley.

lengthy and confusing fax,¹¹ LaValley asked to start arbitration, the final step of the grievance-arbitration process. Although our dissenting colleague asserts that LaValley thereby indicated his desire to proceed with his grievance, she concedes that LaValley “failed to expressly indicate that he wanted to proceed” to step two. In the circumstances, we find that the Respondent did not violate the Act by failing to proceed, without request, to step two of the grievance process.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Dated, Washington, D.C. January 13, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, concurring in part and dissenting in part.

The Board regards employees’ selection of the agents of their collective-bargaining representative as “purely an internal union affair” and as an exercise of Section 7 rights.¹ The employer here sent each Union-represented employee a memorandum asking the employee to identify whether he continued to support union negotiator, Dave LaValley, whom the employer had just discharged (a fact that had no legal bearing on his union role).² Em-

ployees were asked to sign their names to their response. This nonsecret poll obviously tended to coerce employees in their selection of a spokesman and unlawfully interfered with internal union matters. Cf. *Struksnes Construction Co.*, 165 NLRB 1062, 1062–1063 (1967) (recognizing that employer polling of employees to determine support for union “tends to impinge on Section 7 rights” and establishing requirements for polling, including secret ballot).³

The record shows that several employees voiced fears that LaValley’s discharged status would reflect badly on the Union generally if he continued to negotiate on its behalf. Thus, employee Ed Bender expressed concern in a memo circulated December 9 over the continued representation of the Union by LaValley because “he is no longer employed by Alan Ritchey and by virtue of him being at the negotiating table (in his current status) may leave a sour taste with whomever we negotiate with on behalf of Alan Ritchey.” Bender’s memo also emphasized the necessity for the drivers to act quickly.

The Respondent seized on the concern expressed by Bender and ran with it. It sent a letter to each employee that stated:

It has recently come to our attention that many of you do not wish to have Dave LaValley as your bargaining representative because he is no longer employed by Alan Ritchey. Please indicate on this let-

ter during his 8 years working for the Respondent in order not to get him into trouble. The record reflects that the incidents for which LaValley was ultimately fired—one of which was a public disturbance—were reported directly to Operations Manager Williams.

I dissent from the dismissal of the 8(a)(5) allegations arising from the Respondent’s treatment of LaValley’s discharge grievance. After his step 1 grievance was denied, LaValley sent a timely letter stating that “if this illegal discharge is going to continue please start the final step, arbitration.” Although he failed to expressly indicate that he wanted to proceed to step 2 of the grievance process, which preceded arbitration, his letter makes clear that he wished to continue to pursue the grievance. The Respondent’s failure to respond to this timely request, and its subsequent refusal to go forward due to untimeliness when LaValley followed it with a letter expressly requesting a second step appeal, were unjustified.

³ The majority insists that the *Struksnes* line of cases is inapposite here because those cases are concerned with the employees’ choice whether or not to be represented by a particular union, rather than whether to have particular individuals as their union agents for purposes of collective bargaining. I disagree. In both situations, the employer is interfering with the employees’ free choice of their representative, whether a particular entity or a particular person. There may be a difference in the degree of interference, but the interference exists regardless. See *Modern Drop Forge Co.*, supra, 326 NLRB at 1344 (finding that employer violated Sec. 8(a)(2) and (1) by interfering with employees’ choice of a union agent, based on same principles applicable in cases where employer favors one union over another, because “[u]nlawfully recognizing and bargaining with persons other than the union’s designated agents violates [the Act], the same as recognizing and bargaining with the wrong union”).

¹¹ As the judge observed, the 15-page fax was addressed to Ken Brown, but the Respondent employed no Ken Brown. The copy of the fax introduced into evidence was missing pages 2 through 8; no party was able to explain what was omitted or why. Furthermore, pages 9 through 12 consisted of press releases from the American Civil Liberties Union, and pages 13 and 14 consisted of information pertaining to the Americans with Disabilities Act. The Respondent’s operations manager testified, without contradiction, that information on the last page of the fax led him to believe that LaValley was attempting to resolve the matter through the ACLU. LaValley himself never testified that he regarded the fax as a request to go to step two. He relies on a letter he sent on October 3, which the judge reasonably found was nothing more than a request for information.

¹ See *Modern Drop Forge Co.*, 326 NLRB 1335, 1344–1345 (1998), citing *Howland Hook Marine Terminal Corp.*, 263 NLRB 453, 454 (1982). Cf. *Armored Transport, Inc.*, 339 NLRB 374, 377–378 (2003) (employer unlawfully interfered in relationship between employees and union by disparaging union and inviting decertification and interjected itself into “internal union affairs upon which an employer is not free to intrude”).

² I concur in the dismissal of the allegation that LaValley’s discharge was unlawful. In so doing, however, I also rely on the testimony of LaValley’s long-distance driving partner and supervisor, Don Ash, that he failed to report much of LaValley’s abusive and intemperate behav-

ter if this is correct or not. . . . It is important that we know who your bargaining representative is so that we may communicate with and negotiate with that person pursuant to the mutual cooperation agreement. Once you have signed the appropriate area, return the letter to Don Ash. Thank you for your time in this important matter [and] sign[] the appropriate area.

....

I want Dave LaValley as my bargaining Representative.

[E]mployee signature

I do not want Dave LaValley as my bargaining representative.

Employee signature

In other words, the letter asked each employee to identify himself as for or against LaValley, tacitly affirming LaValley's undesirability in the Respondent's view as the employee's bargaining agent.⁴ And it placed employees on the spot, forced to declare whether they were for or against a bargaining agent whom they would reasonably believe was disfavored by their employer.

But with its letter, the Respondent injected itself into a process where its proper role, if any, was at best severely limited. The Respondent did not simply request employees to clarify, through the Union, the identity of their chosen bargaining agent. Rather, it asserted that "many" employees did not support LaValley "because he is no longer employed by Alan Ritchey," without mentioning support for LaValley among employees. The letter effectively preempted the Union's own process for resolving issues surrounding LaValley's status, and it implied the Respondent's preference for someone other than LaValley, calling attention to his discharge. In short, the letter was not truly neutral.

The majority asserts that I overstate the efforts underway among the union members to select a new representative. The majority neglects to mention, however, that, in addition to Bender's December 9 letter, LaValley had circulated a petition between December 7 and 14 asking whether his fellow union members wished for him to continue to represent them in bargaining. Although only 8 employees out of 20 had signed the petition by December 9 (according to Bender's letter) the petition accumu-

lated 17 signatures by December 14, according to the judge. Had the Respondent contacted LaValley to resolve its uncertainty about the bargaining representative, it would have learned that a majority of employees had again selected him. Instead, the Respondent directly solicited employees to consider whether they desired LaValley's continued representation.⁵ In so doing, the Respondent clearly interfered with the Union's internal administration and with the employees' exercise of the fundamental right to choose their representatives free from employer influence.

In concluding that the Respondent's polling was not coercive, the majority and the judge rely on several factors: "[T]ime was of the essence; the drivers were clearly involved in an intra-union dispute; the poll was conducted for a legitimate reason; it was factual and the Respondent did not indicate a preference for one negotiator over another; all the drivers were aware of the surrounding circumstances; there was no anti-union animus by the Respondent; and there were no contemporaneous unfair labor practices that would cause the Respondent's motives to be suspect." Neither the judge nor the majority explains the basis in law for treating these criteria as probative.

In any case, I do not agree that the Respondent was caught in an intraunion dispute regarding choice of a bargaining agent. As explained, employee Bender's December 9 memo to union members proposed implementation of a formalized system for selecting bargaining agents. In the meantime, LaValley's petition was circulating, and, had the Respondent not interfered, would by December 14 have established him as the employees' chosen representative in the upcoming negotiations. As for the surrounding circumstances of which the drivers were aware, these included LaValley's recent discharge, which prompted the concern over his continued representation of the drivers and made the poll more (not less) coercive by reminding employees that LaValley was considered by management to be unfit to work at the company. Finally, the majority's reliance on an absence of animus is misplaced: It has long been established that a finding of a reasonable tendency to coerce in violation of Section 8(a)(1) is independent of motivation, similarly for violations of Section 8(a)(2). E.g., *American Freightways*, 124 NLRB 146, 147 (1959); *Ladies' Garment*

⁴ Cf. *Wire Products Mfg. Corp.*, 326 NLRB 625, 626 (1998), enf'd, 210 F.3d 375 (7th Cir. 2000) (employer violated Sec. 8(a)(1) by implicitly soliciting employees to decertify union, despite absence of express appeal).

⁵ Although LaValley apparently attempted to contact the Respondent, the Respondent did not contact him directly until January 3 by letter: "This letter is in response to your voice messages over the past weeks. A majority of ARI employees have indicated that they no longer want you to represent them as their bargaining representative; they have chose [sic] other representatives. Based upon this information, I will not be scheduling any upcoming negotiation sessions with you."

Workers Union v. NLRB, 366 U.S. 731, 738–739 (1961) (good faith not a defense to violation of Sec. 8(a)(1) and (2) because “nothing in the statutory language prescrib[es] scienter as an element of the unfair labor practices involved”).

In addition to its chilling effect on individual employees, the Respondent’s polling memorandum interfered with the Union’s own efforts to reform its selection process and choose a representative for the upcoming negotiations. It is clear from employee Bender’s memo that the membership was actively seeking to correct the lack of a formal agent selection process and to identify a bargaining agent. The Respondent directly interrogated employees about their continued support for LaValley, rather than leaving this “purely internal union affair” to the Union. Thus, the Respondent unlawfully interfered with the administration of the employees’ labor organization in violation of Section 8(a)(2). *Modern Drop Forge Co.*, supra, 326 NLRB at 1335.

The majority insists that the Respondent’s poll was not unlawful because the Respondent needed to know who it would be negotiating with and the loose organization of the Union made it “virtually impossible to find out from an authorized person who the representative would be.” The proper course for the Respondent, however, was to continue to bargain with LaValley unless and until he was replaced. Even if the Respondent had a legitimate interest in determining the identity of the Union’s negotiator, the device it used was clearly unlawful, not least because it forced employees to disclose their individual preferences and to identify themselves to the Respondent.⁶ The Respondent was not without less intrusive alternatives. To begin, it could have and should have communicated with LaValley himself.

Employers simply are not entitled to intermeddle in union affairs as the employer here did. Accordingly, I would conclude that the Respondent’s polling violated both Section 8(a)(1) and (2) of the Act.⁷

⁶ Cf. *Top Job Building Maintenance*, 304 NLRB 902, 907 (1991) (supervisor’s solicitation and witnessing of employee signatures on decertification petition was unlawful).

⁷ Accordingly, I do not address the majority’s 8(a)(5) direct-dealing discussion.

Although I would find that the Respondent’s polling was unlawful, I would not find it necessary to set aside the contract negotiated by employee Martin Aldrich, who volunteered to take LaValley’s place as the Union’s bargaining agent, under the particular circumstances here. The judge found that LaValley conferred regularly with Aldrich, who sought his input throughout the negotiations. Thus, there is no indication that LaValley’s input into the negotiations was significantly diminished by his loss of status as the Union’s bargaining agent.

Dated, Washington, D.C. January 13, 2006

Wilma B. Liebman,

Member

NATIONAL LABOR RELATIONS BOARD

Sandra L. Lyons, Esq., for the General Counsel.

Dawn C. Valdivia, Esq. and Kevin Duddleston, Esq. (Snell & Wilmer), of Phoenix, Arizona, for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in Phoenix, Arizona, on April 1 and 2, 2003. The charge in Case 28–CA–18282 was filed by David LaValley, an individual, on November 5, 2002. Thereafter, LaValley filed the additional captioned charges. On January 30, 2003, the Regional Director for Region 28 of the National Labor Relations Board (Board) issued an order consolidating cases, consolidated complaint, and notice of hearing alleging violations by Alan Ritchey, Inc. (Respondent) of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (General Counsel), and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Texas corporation with an office and principal place of business in Valley View, Texas, and a truck transfer point located at the Little America Truck Stop in Flagstaff, Arizona. The Respondent is engaged in the business of transportation of mail for the United States Postal Service throughout the United States. It is admitted and I find that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and I find, that the Alan Ritchie Mail Transportation Drivers Mutual Cooperation Association (Union or Association) is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issues in this proceeding are whether the Respondent has violated Section 8(a)(3) of the Act by discharging

employee David LaValley; and whether the Respondent has violated Section 8(a)(5) of the Act by refusing to negotiate with LaValley for a new collective-bargaining agreement, by refusing to process LaValley's discharge grievance, and by refusing to provide LaValley with certain requested information concerning his grievance.

B. Facts

1. Analysis and conclusions

David LaValley was employed by the Respondent as a truckdriver for 8 years. He was discharged in September 2002.¹ In 2000, LaValley was one of the drivers actively involved in forming a group, the Alan Ritchie Mail Transportation Drivers Mutual Cooperation Association to negotiate with the Respondent. The drivers as the driver's representative selected LaValley. LaValley and the Respondent's operations manager, Billy Williams, negotiated the agreement, and the parties entered into a contract, called the Mutual Cooperative Agreement, extending from January 30, 2001 "for a period of twenty-eight (28) months from its effective date[]." Thus, the agreement would have expired on May 30, 2003. LaValley signed the agreement on behalf of the drivers as "Driver-Selected Representative."

The Association is a loose-knit, informal group. It has no officers, no constitution or by-laws, no dues structure, and no regular meetings. Although the contract contained a grievance procedure, no grievances had been filed until LaValley's discharge, *infra*.

LaValley's immediate supervisor, Don Ash, a friend of some 15 years, was also frequently LaValley's driving partner on long-distance team runs. Ash is both a driver and a supervisor. As a driver he is paid the same as the other drivers under the contract. As a supervisor, he hires drivers and resolves disagreements.

LaValley, an excellent driver, had always had a problem with abusive language and excessive use of profanity and sometimes exhibited a rather volatile temper. He had been warned about this behavior. Ash testified that he had given LaValley many informal-type friendly warnings about his behavior and told him that some day his mouth would get him in trouble. Operations Manager Williams had instructed Ash to verbally have a talk with LaValley and to try to settle him down on "more than one" occasion, and Ash had done so. LaValley's typical response would be that "he didn't give a damn, he was going to say what he wanted to say, the way he wanted to say it."²

In September, LaValley was involved in two such incidents that occurred only several days apart. The first incident involved a reprimand from a supervisor, Eddie Goins, for allegedly failing to remove certain personal belongings from a truck prior to its use by the next driver. Upon receiving this message

from Goins, LaValley called Goins and left the following voice mail in a belligerent tone of voice:

This message is to Eddie Goins. This is Dave LaValley. Ron and I have made an agreement. He doesn't—it is okay to leave my stuff in the goddamn truck, so let's get this stuff straight, Eddie. This isn't your damn business. We have—Ron and I—Ron takes the truck from me, he says leave the stuff in there, it is okay, and so that's what I do. You got it? Keep out of my business.

LaValley would have received only a verbal reprimand for this conduct.³ However, within a few days LaValley appeared at a medical clinic to take his annual driver's physical pursuant to the terms of his employment and Department of Transportation regulations. Personnel from the clinic phoned the Respondent to complain about LaValley's conduct, and the Respondent's safety committee, comprised of three individuals, investigated the matter. The safety committee consists of Operations Manager Williams, Safety Director Tom Riddle, and Human Resources Director Debra Norwood.

A memorandum prepared by Riddle recounts a September 18 phone conversation with Becky, one of the personnel in the clinic. When LaValley was told that he would have to pay an additional \$15 for a state form to be filled out and submitted,

[LaValley] cursed loudly and swore at [Becky] and Patricia. She said he shook his finger at them and was very loud and intimidating. She said he called them names. She said they asked him to leave but he just went on and on till they threatened to call the police. She said that they do not want him back in the clinic.

And the September 19 statement from the other individual involved in the incident, Patricia, is as follows:

Patricia tried to explain [the reason for the additional \$15 fee for filling out the state form] . . . that LaValley got upset and started swearing in the hall and it escalated through the clinic all the way to the front office and waiting room where everyone in the clinic could hear him. She said he went on and on about doctors in general using language that made the[m] very uncomfortable. She asked him not to come back. She asked Candice to call the police while he was yelling. She said she started to and LaValley left then he came back in again and she told her to call the police again. She said it was one of two of the worst situations in the 15 years she had worked there. She said she did not know how she could have done better and that she wanted to help him. She said that he called her a broad and was intimidating. She said that [he] was yelling "Piss on all the doctors just piss on them all." She said there was no point in trying to reach him, he just would not listen.

As a result the safety committee, without asking for LaValley's position, determined that he should be discharged. LaValley, during the course of his testimony, did not deny creating the

¹ All dates or time periods herein are within 2002 unless otherwise indicated.

² In fact, LaValley testified that he believed he had a first amendment right to use any language he pleased, as this was a matter of his constitutional freedom of speech.

³ Williams, whom I credit, testified that he phoned Ash and instructed him to verbally reprimand LaValley about his insubordinate behavior to a supervisor, and to tell him the Respondent would not tolerate that type of conduct.

disturbance or using profanity. However, he explained that his conduct was the result of a number of things that irritated him, namely, that the clinic personnel required him to wait in the waiting room and took other patients ahead of him, and required him to pay for a form that should have been furnished free of charge; further, he did not like having to take a physical in the first place and was consumed by anxiety as he had an intense disrespect for doctors in general because a doctor had allegedly engaged in malpractice that directly caused his wife's death not long before.

After the safety committee made its decision, Williams phoned Ash and instructed him to discharge LaValley. Ash suggested a possible suspension instead, and was told that the decision had already been made.

As noted above, the agreement between the Association and the Respondent was effective by its terms until May 2003. However, in October, Williams learned that a new agreement would have to be completed by January 30, 2003, as this was the deadline set by the United States Postal Service for the completion of new collective-bargaining agreements. If there was no new contract in place by that date, then the wage scale of the old contract would have to remain in effect for a year or two until a new open period, and this would impact the employees to their detriment.

Williams gave no official notification to LaValley about this situation, as it was William's belief that LaValley could not be a representative of the employees for purposes of negotiations since LaValley was no longer an employee. However, Williams let it be known generally that a new agreement had to be reached by January 30, 2003 to avoid adverse repercussions to the employees. Upon learning of this, LaValley, who was intending to appeal his dismissal through the contractual grievance procedure, assumed that he would be the Association's negotiator, and began contacting employees to obtain their input for a successor agreement. This caused certain employees to voice some concern, as they were not comfortable with the dynamics of having a discharged employee as their spokesperson, and believed that this could adversely affect the negotiation process.

Ash testified that after LaValley's termination he talked with a number of employees who expressed their preference to have someone else represent them in bargaining negotiations.

Martin Aldrich testified that he had conversations with three or four drivers who expressed such concerns about LaValley, and that he also had such reservations.⁴ He decided to volunteer to become the spokesperson for the employees. Thereupon, he called each driver and left a message on their voice mail stating that it appeared someone other than LaValley should be the negotiator, and that he would volunteer if no one else wanted to. He received some positive feedback from some of the drivers and no negative feedback. Thereupon, he set up two meetings with the drivers "to get going on this contract . . . and get a forum or discussion going about it." However, according to Aldrich's testimony, LaValley attended the meetings and began conducting them as if the meetings were his idea,

and solicited the drivers who attended the meetings to sign a petition authorizing him to conduct negotiations.

Ed Bender, a driver, testified that he personally told LaValley that "I didn't think it was appropriate that he represent us in that capacity [since] . . . he was no longer employed by Alan Ritchey." Bender testified that most drivers felt the same way. On December 9, Bender prepared a memorandum to the drivers entitled "Negotiation Process and Organization," and sent it to all the drivers as well as to Williams. The memorandum states:

First of all let me say that I really have nothing personally to gain by this memo in that I will be retiring in a few months, after over twelve years with the company. I would like to see better organization which may, in the future, avoid the problem we are going through now in the negotiation process—who will represent us as the "bargaining table."

1. I think the Flagstaff drivers should have some type of formal organization—"Flagstaff Drivers Association" for lack of a better name. It would include a communication procedure and a method to resolve Flagstaff problems with the company, and others, and a means to designate representatives for various concerns which now involves our rep for negotiation for our new contract. I wish Don Ash could be involved but he can't in that is a part of Anal [sic] Ritchey Management being our "boss" here in Flagstaff.

2. I personally have a problem with Dave LaValley representing us in the negotiation process because of his current status. He represented us well in our previous negotiations and has some good ideas. But he is no longer employed by Alan Ritchey and by virtue of him being at the negotiating table (in his current status) may leave a sour taste with whomever we negotiate with on behalf of Alan Ritchey. This "sour taste" could result in our requests not being considered appropriately. Dave may be re-employed, evidently he has a strong case, but currently he is not. I personally wish him well in this regard.

As of today, at 10:30 a.m. eight (8) drivers out of twenty (20) have signed the request by Dave to be our designated negotiations representative. Whether the other twelve (12) do not want Dave for our rep or they haven't had the time to sign I don't know. But time is of the essence and we are late now in "getting our act together" in coming up with our negotiation concerns.

As of this writing I am awaiting a call from Billy Williams as to what the time line is. Possibly this problem can be resolved in our meetings this Wednesday and Thursday, 7:00 pm, At the Little America Coffee Shop. If you are unable to be at either of these meetings please pass on your thoughts with someone else or leave them in writing. We need your ideas and concerns.

Williams testified that he understood there was concern among the employees about the status of LaValley, and to clarify the situation he instructed Ash, apparently on December 13, to disseminate the following memorandum and to advise him of the results:

⁴ At the outset of the hearing Martin Aldrich claimed that he, not LaValley, represented the employees in this proceeding.

Dear Employees:

It has recently come to our attention that many of you do not wish to have Dave LaValley as your bargaining representative because he is no longer employed by Alan Ritchey. Please indicate on this letter if this is correct or not. It is important that we know who your bargaining representative is so that we may communicate with and negotiate with that person pursuant to the mutual cooperation agreement. Once you have signed the appropriate area, return the letter to Don Ash. Thank you for your time in this important matter.

....

I *want* Dave LaValley as my bargaining representative.

employee signature

I *do not want* Dave LaValley as my bargaining representative.

employee signature

The drivers returned the forms to Ash, who in turn forwarded them to Williams. Eight drivers selected LaValley, and 15 drivers voted that they did not want LaValley as their bargaining representative. Apparently, LaValley continued to maintain that he was the representative. Williams advised LaValley by letter dated January 3, 2003, as follows:

This letter is in response to your voice messages over the past weeks. A majority of ARI employees have indicated that they no longer want you to represent them as their bargaining representative; they have chose other representatives. Based upon this information, I will not be scheduling any upcoming negotiation sessions with you. These sessions will be held with the newly selected employee representative(s). If the employees indicate to me otherwise, I will contact you.⁵

Aldrich advised Williams that he was the driver's representative. Aldrich and Williams negotiated a new 2-year agreement effective from January 29, 2003, until January 29, 2005. There is no indication that any of the Respondent's current drivers have objected to Aldrich as their representative or to the terms of the collective-bargaining agreement.⁶

The General Counsel maintains that the Respondent seized upon LaValley's conduct as a pretext for discharge in order to prevent LaValley from continuing as the employees' bargaining representative. Thus, LaValley testified that he often complained to Ash, during their trips together, about one aspect of the contract that he believed to be unfair to the employees, namely the Qualcomm system. The Qualcomm system is a satellite

tracking system installed on each truck that enables the Respondent to determine, in addition to the location of the truck, precisely how many hours and minutes each truck is being operated, and therefore the amount of driving time between stops; this is determinative of the wages to be paid for each trip. I credit Ash, who favorably impressed me as a very candid witness, and find that although this was sometimes a topic of conversation with LaValley as he was also concerned about wages, he did not advise Williams that LaValley was concerned about this or intended to make an issue of it during future negotiations. Moreover, at the time of LaValley's discharge, the current contract was to continue for some 8 months.

LaValley's conduct was clearly inappropriate. He had been warned many times about his inability to control his language and temper. There is no showing that Williams harbored animus against LaValley or was concerned that LaValley's position as negotiator would somehow be detrimental to the Respondent's interests during future negotiations.⁷ Moreover, I credit Williams and Riddle and find that LaValley's status as negotiator had nothing to do with the decision of the safety committee to discharge him. I shall dismiss this allegation of the complaint.

The General Counsel maintains that the Respondent was obligated to bargain with LaValley unless it had a good faith doubt that a majority of unit employees no longer wanted LaValley to act as their negotiator. However, the General Counsel has cited no cases for this proposition. The cases cited by the General Counsel are inapposite as they involve *Struksnes*,⁸ polls to determine whether the employees desire to continue being represented by a particular labor organization. Here the Respondent was not attempting to withdraw recognition.

It is clear that the Respondent, receiving conflicting information, was attempting to discern whether the drivers wanted LaValley to negotiate the successor contract. In the typical situation this is not a problem as the union designates the negotiator and the employer must comply. However, here it seems the Association abdicated its responsibility and left it to the machinations of individual employees to determine whether LaValley or some other individual would be authorized to do the negotiating. This presented the Respondent with a dilemma. Under the circumstances, I find that the Respondent's poll was noncoercive: time was of the essence; the drivers were clearly involved in an intraunion dispute; the poll was conducted for a legitimate reason; it was factual and the Respondent did not indicate a preference for one negotiator over another; all the drivers were aware of the surrounding circumstances; there was no antiunion animus by the Respondent; and there were no contemporaneous unfair labor practices that would cause the Respondent's motives to be suspect. Under the circumstances, the poll was simply tantamount to a letter to each member of the Association asking the group, collectively,

⁵ In fact, the aforementioned petition LaValley had circulated among the employees between December 7 and 14 contains the signatures of 17 drivers who indicated that they wanted LaValley to represent them in negotiations for the new contract. For some unknown reason, LaValley did not rely upon this petition or present it to either the Respondent or the other employees.

⁶ During the course of negotiations, LaValley conferred regularly with Aldrich, who asked for LaValley's input; thus, LaValley did in fact assist Aldrich with contract proposals and other contract matters.

⁷ I do not credit LaValley's testimony that Ash told him a particular applicant had not been hired by Williams because Williams believed he was a union advocate. I credit Ash's denial that he made such a statement.

⁸ *Struksnes Construction Co.*, 165 NLRB 1062 (1967).

to designate a negotiator for a successor agreement.⁹ This is something the Association should have done on its own volition.¹⁰ The Respondent, for the benefit of the drivers, was anxious to begin negotiations; and it simply and legitimately wanted to know with whom to negotiate. I shall dismiss this allegation of the complaint.

Following his discharge on September 20, LaValley timely filed a grievance under step one of the contractual grievance procedure. This was the first grievance ever filed under the contract. His step one grievance was denied. The Respondent maintains that LaValley did not timely file his step two appeal. The step 2 appeal was required to be filed by October 4. The General Counsel claims that in fact LaValley did timely file the step 2 appeal. Thus, on September 27, LaValley sent a 15-page fax to the Respondent. However, the first page states as follows:

To: Ken Brown

This is where I am forced to to [sic] go for my illegal discharge. My 1st Amendment rights have been violated by the company, Which [sic] holds a government contract and can not discriminate under the A.D.A. Act, Or [sic] violate my Constitutional Rights.

The Respondent employs no person by the name of Ken Brown. In fact, LaValley testified that he was intending to send the fax to Craig Brown, the Respondent's attorney. Pages 2 through 8 of the fax are missing from the exhibit. Neither LaValley, nor the General Counsel, nor the Respondent can account for the missing pages and there is no reliable record evidence concerning their substance. Pages 9 through 12 contain news bulletins from the American Civil Liberties Union regarding free speech matters. Pages 13 and 14 contain information about the Americans with Disabilities Act. Page 15 is as follows:

To: Billy Williams

[I]f [sic] this illegal discharge is going to continue please start the final step, arbitration.

Thank you

⁹ Indeed, it remains unclear who represents the Association in this proceeding. As there are no officers of the Association, it would appear that any particular driver has equal authority. The petition signed by a majority of employees simply authorizes LaValley to "represent me on the Mutual Cooperative Agreement negotiations for the 2003-2004 Contract with Alan Ritchey Inc." It does not give LaValley the authority to file charges or speak for the Association regarding any other matters. Similarly, it appears that Aldrich's authority only encompasses his negotiating capacity. It is likely that the remedy proposed by the General Counsel and LaValley, namely that certain portions of the contract should be renegotiated by LaValley, is detrimental to the interests of the drivers. Insofar as the record shows, only LaValley, a non-employee, is not happy with the contract negotiated by Aldrich.

¹⁰ Bender's analysis of the situation in the December 9 memorandum he sent to each employee was entirely correct: the Association should develop a "communication procedure and a method to resolve flagstaff problems with the company, and others, and a means to designate representatives for various concerns which now involves our rep for negotiation for our new contract."

Dave LaValley

cc: ACLU PHX Office

Williams testified that he did not know what to make of this fax and did not know that the fax was for the Respondent's attorney. He did not consider it to be a request for the step 2 appeal, as it says nothing about a step 2 appeal; rather, it speaks of arbitration. He noticed that page 15 was copied to "ACLU PHX Office" and surmised that LaValley was attempting to resolve the matter through the ACLU.

On October 3, still within the time limitation for the step 2 appeal, LaValley sent identical letters by certified mail to each member of the safety committee, as follows:

I respectfully request you to reply in written form within 7 days of receipt of this letter why you discharged me from my employment with Alan Ritchey Inc. Please include all information that you considered in your decision, including all persons and entities you had contact with in this matter.

LaValley testified that he considered this letter to constitute the step two appeal that would commence the step 2 process.¹¹ Williams testified that he regarded the letter only as a request for information, as it says nothing about a step 2 appeal. Williams furnished LaValley with certain information.

In a fax to Williams dated October 9, LaValley states that:

I sent the letters requesting the information on my discharge to you, Debra Norwood, and Dan Riddle. Will you please advise me when I will have my replies and when we can set the time for the second step of the appeal process?

Williams replied by letter dated October 14, advising, *inter alia*, as follows:

When I received your request to move to Step II proceedings of the appeal process, I noticed your request was not made within the five days mandated in the Mutual Cooperative Agreement. Since the appeal process has concluded, there should be no reason for you to wait in filing your complaint with the ACLU.

Thereafter, LaValley requested certain additional information regarding his dismissal, and the Respondent has taken the position that since the matter is closed it has no obligation to furnish the information.

I shall dismiss the complaint allegation that the Respondent has failed and refused to process LaValley's discharge grievance for discriminatory reasons. As found above, the discharge of LaValley was not discriminatorily motivated. Moreover, the Respondent, as shown by the exchange of documents set forth above, had legitimate reasons for concluding that LaValley had not timely filed a step 2 grievance. Therefore, I find that the Respondent's refusal to continue with the grievance process was not discriminatorily motivated. Finally, because the appeal process had been concluded, I find the Respondent was under no continuing duty to furnish further information to LaValley regarding his termination.

¹¹ He did not testify that he considered the September 27, 15-page fax, to constitute the step 2 appeal.

The complaint alleges that the Respondent unilaterally, without bargaining with the Association, modified the hours of work and the manner of computing wages by instituting the Qualcomm system. The record evidence shows that during the negotiation of the first contract in 2001, this matter was discussed between Williams and LaValley. Thus Williams testified:

Whenever we negotiated our first contract, Dave LaValley and I, we sat down, we discussed Qualcomm, and we adjusted those routes to where we could get them just as close as we could to the time it actually takes to get from Flagstaff to Wasco.

Williams testified that at that time, even though the Qualcomm system had not yet become operative, the Flagstaff drivers were concerned that Qualcomm would result in a pay reduction, and that this was discussed. Williams testified that it was going to be a few months before Qualcomm was turned on, and he advised LaValley during negotiations:

I said, "Dave, we need to make sure that we get this schedule accurate so that it doesn't hurt the drivers whenever we flip the switch and start paying them off Qualcomm."

I credit Williams, and find that the Qualcomm matter had in fact been negotiated. Moreover, the management rights provision of the collective-bargaining agreement specifically permits the Respondent to "introduce new equipment, technologies and

supplies" and "to introduce technological change to existing services, techniques or equipment"; and the wages and benefits section of the agreement states that, "The hours to be paid to each Driver per run will continue to be set by the Company." I shall dismiss this allegation of the complaint.

Accordingly, I shall dismiss the complaint in its entirety.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law, I issue the following recommended¹²

ORDER

The complaint is dismissed in its entirety.

Dated, July 3, 2003

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.